90-721

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

EMORY L. CLARK,
Petitioner,

v.

THOMSON McKINNON SECURITIES, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Hoke Smith, III
Attorney for Petitioner
Counsel of Record

CLARK & SMITH, P.C.
One CNN Center
740 South Tower
Atlanta, Georgia 30303-2705
(404) 522-2222

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the non-moving party to a motion for summary judgment under rule 56 of the Federal Rules of Civil Procedure should survive the motion when he supports his Response in Opposition with an affidavit and deposition excerpts establishing the existence of genuine material facts that he as a customer made disclosures to the securities broker of his insolvency prior to the securities broker making investments on his behalf.

(2) Whether a customer's disclosure of insolvency made prior to the securities broker making investments on behalf of the customer is a **singular circumstance** which relieves such investor of his obligation to the broker.

(3) Whether a customer has either a cause of action or a breach of contract defense as a result of his securties broker's failure to comply with the rules and regulations of the Chicago Board of Option Exchange where the parties had earlier contracted to comply with said rules as incorporated in their contract.

(4) Whether Summary Judgment is proper in the absence of viewing all evidence thereon in a light most favorable to the non-moving party.

PARTIES TO THE PROCEEDING

With the exception of the parties whose names appear in the caption of the case, the only other party contemplated by Rule 29.1 of this Court is Thomson McKinnon Securities, Inc., Debtor in Possession, United States Bankruptcy Court, Southern District of New York, Case No.: 90B10914 and the sixty-six (66) parties referenced by counsel for the Respondent Thomson McKinnon in the "Certificate of Interested Persons" in the Brief of the Appellee in the United Sates Court of Appeals for the Eleventh Circuit, Case No. 89-8538.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Provisions

Governmental And Administrative Regulations

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

EMORY L. CLARK,

Petitioner

v.

THOMSON McKINNON SECURITIES, INC.,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Emory L. Clark respectfully petitions that this most august forum grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, Case No. 1: 87-CV-2443-0DE, granting Respondent's Motion for Summary Judgment, not reported, is fully set forth in Appendix B.

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the District Court is reported at 901 F. 2d 1568 and appears as Appendix A.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered Judgment on May 3, 1990. Timely Petition for Rehearing was denied on July 27, 1990. Appendix C and Appendix D. Jurisdiction of this Court is invoked under 28 U. S. C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Rule 56(c) and (e) of the Federal Rules of Civil Procedure and the Securities Exchange Act of 1934, 15 U. S. C. section78g(c). Appendix E and F respectively.

STATEMENT OF THE CASE

This case was originated by Respondent Thomson McKinnon Securities, Inc. (hereinafter "Thomson McKinnon") in the United States District Court for the Northern District of Georgia November 9, 1987. The Complaint sought to recover monies allegedly due and owing on Petitioner Clark's account with Respondent, charging that the allegations contained therein arose out of the unprecedented and catastrophic stock market drop of 508 points on October 19, 1987 (otherwise known as "Black Monday"), and the subsequent naked option trades of October 20, 1987.

The Complaint alleged 1) that Clark experienced losses

between $7,000.00 and $8,000.00 on Black Monday, 2) that he called the Respondent's agent on Tuesday, October 20, 1987 hoping to reverse his previous days losses, 3) that he requested to enter new transactions which were accepted and placed by Thomson McKinnon's broker 4) that the new transactions of October 20, 1987 caused substantial losses to Clark's margin account, and, 5) that after the margin call subsequent to the October 20, 1989 losses, Thomson McKinnon closed Clark's account and filed the original Complaint of the case *sub judice*. Federal jurisdiction under 28 U.S.C. section 1332 was based upon the amount in controversy which exceeded the sum of $10,000.00, and the diversity of citizenship.

Mr. Clark filed an answer and counterclaim setting up, *inter alia*, defenses in answer, based upon Thomson McKinnon's failure to mitigate damages, the doctrine of estoppel, breach of contract, negligence, illegality, assumption of the risk and waiver. The counterclaim sounded only in fraud.

Mr. Clark subsequently moved to add Thomson McKinnon's employee-broker, Jerome C. Dodgen, as a counterclaim defendant, and the District Court granted said motion. On August 10, 1988, Thomson McKinnon moved for summary judgment, and on September 2, 1988, defendant Clark timely filed his response with appropriate affidavit and deposition evidence in opposition. Clark's affidavit and deposition excerpts substantiated his

defense of breach of contract and the bar defenses. The deposition excerpt(s) proffered, contained both Clark's testimony and that of the then defendant Dodgen. Each testified that on the morning of October 20th, Clark after learning of his $7,000.00 to $8,000.00 losses of October 19, 1987, then told Dodgen that he could not pay the $7,000.00 to $8,000.00 losses or any future transactional losses. This testimony was reiterated in Clark's affidavit, filed as an attachment to his response in opposition to the movant's motion for summary judgment.

On January 4, 1989, the District Court granted Thomson McKinnon's motion for summary judgment erroneously ruling that dismissal of this Counterclaim with prejudice barred asserting affirmative defenses on any issue raised in the counterclaim, i.e., violation of securities laws, breach of contract, or Chicago Board of Exchange (hereinafter C. B. O. E.) Rule violations incorporated in the parties contract. The Court further held that even if Mr. Clark was not barred from defending on the substance of his counterclaim, Thomson McKinnon would still be entitled to summary judgment; the latter reasoned upon the trial Court's prior ruling in *Thompson v. Smith Barney, Harris Upham & Co.*, 539 F. Supp. 859, 865 (N. D. Ga. 1982), *aff'd.*, 709 F. 2d 1413 (11th Cir., 1983), which held that a broker's violation of exchange "know your customer" and "suitability" rules do not give rise to a private cause of action.

The final Order and Judgement of the United States District Court was entered on June 1, 1989.

On June 30, 1989, Mr. Clark filed his Notice of Appeal in the United States District Court for the Northern District of Georgia, appealing the Order granting summary judgment in favor of Thomson McKinnon.

THE DECISION BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed, holding generally, "that Thomson McKinnon's alleged violation of exchange rules by over-extension of credit was not a defense to the broker Thomson McKinnon's action to collect the deficit account, and a breach of contract condition by the broker, at the instance of the trader clearly waives such term as a condition precedent to payment." *Thomson McKinnon Securities, Inc. v. Clark*, 901 F. 2d 1568 (11th Cir., 1990). Thus, the Circuit Court did not reach the merits. Consequently, the Court overlooked the paramount consideration of "**singular circumstance**" present in this case, but glaringly absent in *Merrill Lynch, Pierce, Fenner & Smith*, Inc. v. *E. B. Brooks, Jr.*, 548 F. 2d 615, 617 (1977). The *Brooks, supra*, opinion relied upon by the Eleventh Circuit, held that the Court must in such situations, leave the parties as it found them.

REASONS FOR GRANTING THE WRIT

This case merits the Supreme Court review because the opinion by the Eleventh Circuit Court of Appeals in its interpretation and application of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. E. B. Brooks, Jr., supra*, and *Thompson v. Smith Barney, Harris Upham & Co., Inc.,* 709 F. 2d 1413, 1419 (11th Cir., 1983) conflicts with the law of *Avery v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 328 F. Supp. 677 (D.. D. C., 1971), and that of the First, Second, Third, Sixth and Ninth Circuit Court of Appeals which recognize the existence of a private right of action against securities broker - dealers for violation of the margin requirements of the Securities Exchange Act (15 U. S. C. 78g). See Appendix F. Further, the opinion below affirming the trial court which failed to view the evidence before it on summary judgment in a light most favorable to the non-moving party, contradicts established case law of this Court.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRONEOUSLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN DISALLOWING THE NON-MOVING PARTY'S BREACH OF CONTRACT DEFENSE WHICH BURDEN WAS SUPPORTED BY EVIDENCE OF EVERY ELEMENT OF THE

MOVANT'S BREACH; THE TRANSACTIONAL CAUSE OF ALL BUT $7,000.00 TO $8,000.00 OF THE $180,609.40 DAMAGE AWARD.

Attached to his response in opposition to summary judgment, the non-moving defendant Clark supplied deposition excerpts wherein he and the broker's agent, Dodgen, both testified that on October 20, 1987, before any trades were placed, Clark told Dodgen he could not pay for the October 19, 1987 losses in his account of $7,000.00 to $8,000.00 or for future transactions if they went against him. Further, Mr. Clark supplied an affidavit wherein paragraph four (4) he recapitulated his inability to pay, constituting his notice of unsuitability/ insolvency. In point of fact, Clark consistently pled that upon respondent's being informed of this fact, their acceptance of his further trades or new orders was a violation of C. B. O. E. Rule 4.1, and a violation of the broker's fiduciary duty arising from the contractual relationship of the parties. The incorporation of the C. B. O. E. rules into the contract makes the broker's breach of the margin requirements the material and relevant transactional cause of the loss. Moreover, the acceptance of the naked options on October 20, 1987 was a violation of the Securities Exchange Act, 15 U. S. C. section 78g, and hence, illegal, as asserted.

It was error for the Circuit Court to analogize *Goldenberg v. Bache & Company*, 270 F. 2d 675, 681 (5th Cir., 1959), by stating that Clark " 'clearly waved' the relevant term as a condition to his obligation to pay." In essence, the Circuit Court allowed an unknowing waiver of fiduciary duty. Paragraph Sixteen (16) of the parties contract explicitly stated:

> "16. <u>WAIVER</u>
> Your failure to exercise any of your rights in any one or more instances shall not be deemed a waiver thereof for the future. None of the provisions hereof shall under any circumstance be deemed to have been waived, modified or otherwise affected except in writing signed on your behalf by an officer of your firm."

Absent a written waiver, the Circuit Court precedent creates the policy of [unknowing] waiver of both fiduciary and statutory duties of brokers to investors, as well as eliminating any justifiable reliance on the contractual provisions.

The opinion of the Eleventh Circuit misapplied the *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Brooks, supra*, ruling by [ex]cepting from the recitation of their perceived rule of the case, *Brooks, supra*, the <u>most</u> paramount and distinguishing language that "this Court will not relieve this investor or any investor of an obligation <u>unless</u> [singular circumstances] exist." See Brooks, *supra*, [Emphasis added]. Thomson McKinnon's breach of Broad Rules and their breach of fiduciary duty in over-extending credit, while fully cognizant of

Clark's inability to pay for any losses, together with the statutory illegality of their acts are just such instances of the paramount **"singular circumstance"** made reference to by the *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Brooks, supra,* Court.

Federal courts have concluded that whether a fiduciary relationship exists in situations present as in this case, must be determined according to State law. *Greenwood v. Dittmer*, 776 F. 2d 785, 788 (8th Cir., 1985); *McGinn v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 736 F. 2d 1254, 1258 (8th Cir., 1984); *LeBoce, S. A. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 709 F. 2d 605, 607 (9th Cir., 1983). The contract in the case *sub judice* provides that all provisions shall be governed by New York law. The New York Court of Appeals addressed this issue in *Shaw v. Drefus & Co.*, 314 N. Y. S. 2d 372, 379 (Civ. Ct., 1969) stating, unequivocally, that a broker is "required to exercise the utmost good faith and loyalty and not to act in any manner inconsistent with its agency or trust." Therefore, the respondent was inherently bound to the higher standard of fiduciary care which required refusal of (at least until they made further inquiry/investigation of Clark's insolvency/suitability) Clark's October 20, 1987 request for trades. Fully aware of Clark's insolvency, his broker's (the Respondent herein) acts were then made for their own interest, rather than Clark's interest, since they knew his losses were their losses. They were in effect,

dealing for themselves; and brokers may not act in their own interest at the expense of their client. *Union Bank of Switzerland v. H. S. Equities, Inc.*, 457 F. Supp. 515 (S. D. N. Y., 1978).

All trades by Plaintiff for Defendant were contractual as modified by the Supplemental Information and Agreement for Option Trading (hereinafter "Supplemental Agreement.") Both writings incorporated the C. B. O. E. Rules; Rule 4.1 provides:

> No member shall engage in acts of practices inconsistent with JUST AND EQUITABLE PRINCIPALS OF TRADE. Persons associated with members shall have the same duties and obligations as members under the Rules of this Chapter.

C. B. O. E. Rule 12.1 provides:

> No member Organization may affect a transactional or carry on an account for a customer, whether a member or nonmember of the Exchange, without proper and adequate margin in accordance with this Chapter XII and with Regulation T of the Federal Reserve Board.

C. B. O. E. Rule 12.3 and 24.11 establish the minimum amount of margin which must be maintained in margin accounts having positions in securities. Rule 12.3 (a) provides, in relevant part, that:

> (a) Subject to the exceptions set forth in part (b) and (c) thereof, the minimum amount of margin which must be maintained in margin accounts of customers having positions in securities (including options) shall be as follows:

(1) Twenty five (25%) of the market value of all securities having value for margin purposes (as determined in accordance with Rule 12.5) that are long in account, plus...

(5) For each put or call option contract dealt in on a registered national securities exchange, or a registered securities association and issued by the Options Clearing corporation carried in a short position in the account, margin must be deposited and maintained equal to at least 100% of the market value of equivalent units of the underlying security value; and for each put or call contract not dealt in on an exchange carried in a short position in the account, 100% of the current market value of the contract plus 45% of the market value of equivalent units of the underlying security value.

Paragraph four (4) of the Supplemental Agreement provides:

4. Every Option transaction for our account shall be handled in accordance with the constitution, by-law, rules, regulations, directions, requirements and customs (including all changes, amendments or additions therein or thereto which may affect such transactions) or the exchange or other market on which such transaction...

When the S. E. C. promulgated the suitability rule, it enunciated a most detailed list of information needed concerning the customer prior to accepting of executing transactions:

> [A] broker or dealer...[is] expected to make reasonable inquiry concerning the customer's investment objectives, and his financial situation and needs. Information concerning financial situation and needs would ordinarily include information concerning the customer's marital status, the number and age of his dependents, his earnings, the amount of his savings and life insurance, and his security holdings and other assets. See Securities Exchange Act Release No. 8135, at 3 (July 27, 1967).

The Release went on to state that the broker-dealer "may rely on information furnished by the customer." The Release and the United States Code place an affirmative duty upon the broker-dealer to make further inquiry upon receipt of a customer's notice of insolvency. For a broker to accept or place prohibitive, speculative or gambling trades with actual knowledge of the customer's inability to cover any losses which may occur, violates all ethical rules of fair trade. In such transactions the broker clearly accepts the risk of loss since the customer's transactional loss must first be paid by the broker-dealer who knows the customer is unable to cover [pay] his previous days losses or any loss; the broker is then acting for his own benefit.

Pursuant to 15 U. S. C. 78a et. seq., the Board of Governors of the Federal Reserve System has promulgated a series of regulations which restrict the right of broker-dealers to extend or maintain credit to their customers. See 12 C. F. R. section section 220.1 thru .8 (1990). Respondent Thomson McKinnon's over-extension of credit to Petitioner Clark on October 20, 1987

was above all an unlawful act in violation of Title 15 U. S. C. section 78g(c). Admittedly, Clark requested that the trades be placed after being told of his losses of "Black Monday". He, as many others in the aftermath, was "crying out for help." Unfortunately, the plea heard only worked to his further detriment in Thomson McKinnon's attempt to reverse their own loss, for which they knew Clark could not pay, except by making further speculative, gambling trades.

The District Court for the District of Columbia ruled that mere customers participation in or knowledge of a [rule] violation, without fraud or deceit [by the customer] is not enough to deny the customer's recovery. See *Avery v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*, at p. 680. Judge Gasch aptly stated therein also that "to allow the broker to plead contributory negligence or causation by the customer as the reason for a violation would remove the very heart of the legislation; for in every case of a violation, the dealer could be heard to assert participation."

The panel's interpretation of *Thompson v. Smith Barney, Harris Upham & Co., supra*, contradicts other Circuits which recognize a customer's right of action against broker-dealers for violation of Securities Exchange Act margin requirements. It stands to reason that because customers can maintain such an action against a broker-dealer, the same certainly may be raised and supported as the customer's defenses to the broker-dealer's action against the customer.

The action is recognized in the FIRST Circuit in *Landry v. Hemphill, Noyes & Company*, (1973, C. A. 1 Mass.) 473 F. 2d 365, cert. den. 414 U. S. 1002, *reh. den.* 415 U. S. 960; in the SECOND Circuit in *Junger v. Herts, Neumark & Werner* (1970, C. A. 2 N. Y.) 426 F. 2d 805, *cert. den.* 400 U. S. 880; in the THIRD Circuit in *Livingstone v. Weis, Voisin, Cannon, Inc.* (1968, D. C., N. J.) 294 F. Supp. 676; *Jennings v. Boenning & Co.* (1975, D. C. Pa.) 378 F. Supp. 1294, *aff'd* (C. A. 3 Pa.) 523 F. 2d 880; in the FIFTH Circuit in *Goldenberg v. Bache & Co.* (1959, C.A. 5 Fla.) 270 F. 2d 675; *Gordon v. DuPont Glore Forgan, Inc.* (1973, C.A. 5 Fla.) 487 F. 2d 1260, *cert. den.* 417 U. S. 946; in the SIXTH Circuit in *Spoon v. Walston & Co.* (1973, C. A. 6 Mich.) 478 F. 2d 246; in the NINTH Circuit in *Lantz v. Wedbush, Noble, Cooke, Inc.* (1976, D. C. Alaska) 418 F. Supp. 653, and of course is the DISTRICT OF COLUMBIA Circuit in *Avery v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra.*

As the non-moving party-defendant to summary judgment, Clark supplied the Court with evidence on each element of respondent's negligent breach, which was also plead in his defenses in answer. For it was the respondent's illegal and contractually violative acts of zealous speculation which caused Clark's loss.

Affirmance of Summary Judgment in this case was improper and sets in motion precedent of unrelenting magnitude to the detriment of securities customers across this great country.

II.

THE ELEVENTH CIRCUIT OPINION CONTRADICTS ESTABLISHED CASE LAW AND THE F. R. C. P. 56(c) and (e), WHICH HOLDS THAT WHEN PRESENTED WITH A MOTION FOR SUMMARY JUDGMENT, IT MUST VIEW THE FACTS IN A LIGHT MOST FAVORABLE TO THE PARTY OPPOSING THE MOTION.

F. R. C. P. 56(c) (See Appendix E) requires that a trial court view affidavits, attached exhibits, deposition excerpts and all evidence in opposition to summary judgment in a light most favorable to the opposing party. Pleadings and documentary evidence are to be construed liberally in favor of the party opposing the motion. *Harmon v. Diversified Medical Investments Corp.*, 488 F. 2d 111, 113 (10th Cir., 1973) cert. den. 425 U. S. 951 (1976); *United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962); *Associated Film Distribution Corp. v. Thornburgh*, 520 F. Supp. 971, 978 (E. D. Pa., 1981), *rev'd* on other grounds 683 F. 2d 808 (3rd Cir.). However, only disputes over facts that might affect the outcome of the suit under the governing law should properly preclude summary judgement. *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 106 S. Ct. 2505 (1986). It is well settled that to warrant summary judgment, the moving party bears the burden of establishing the non-existence of any genuine issue of fact that is material to a judgment in its favor.

See *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 90 S. Ct. 1598 (1970). Even if the basic facts are not disputed, summary judgment may be inappropriate when contradictory inferences may be drawn from them. *Diebold*, supra. See *Celotex v. Catrett*, 477 U. S. 317, 106 S. Ct., 2548 (1986).

No margin exist for the disposition of material factual issues by use of summary judgment; that procedure cannot serve as a substitute for the trial of cases and does not require the parties to dispose of litigation by use of affidavits. *Harmon*, supra.

In the opinion of the Eleventh Circuit in the case at bar, Judge Roney, relying, but misapplying *Anderson*, supra, stated that even if Respondent Thomson McKinnon violated its own internal policies against accepting trades on October 20, 1987, such fact was not material and genuine as to preclude summary judgment.

The defenses of failure to mitigate damages, the doctrine of estoppel, breach of contract, negligence, illegality, assumption of the risk and waiver were all supported by evidence in opposition to the motion for summary judgment. The facts and evidence on summary judgment, if properly construed most favorably to the non-moving party (Petitioner herein), sufficiently supported the defenses of the Petitioner; accordingly, the grant of summary judgment was improper.

The Eleventh Circuit Panel failed within the context of F.

R. C. P. 56(c), *Anderson, supra*, and established case law to address the error of the trial court's failure to view the evidence properly in granting summary judgment.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

CLARK & SMITH, P. C.

BY:

Hoke Smith, III
Attorney for Petitioner
Counsel of Record

CLARK & SMITH, P. C.
One CNN Center
740 South Tower
Atlanta, Georgia 30303-2705
(404) 522-2222

Appendix A

THOMSON McKINNON SECURITIES, INC.,
Plaintiff-Appellee,

v.

Emory L. CLARK,
Defendant-Appellant.

No. 89-8538

United States Court of Appeals,
Eleventh Circuit.

May 23, 1990.

Stockbroker brought action against trader to recover unpaid balance on options trading account. The United States District Court for the Northern District of Georgia, No. 1:87-cv-244-ODE, Orinda D. Evans, J., entered summary judgment in favor of broker. Trader appealed. The Court of Appeals, Roney, Senior Circuit Judge, held that broker's alleged violation of exchange rules by overextension of credit and alleged violation of internal policies were not defenses to trader's liability to broker.

Affirmed.

1. Brokers 24(1)

Stockbroker's alleged violation of option exchange's rule by overextending credit to experienced trader was no defense to broker's action for nonpayment.

2. Brokers 24(1)

When experienced trader with knowledge of circumstances relating to his own financial condition and position in market expressly requires broker to ignore contractual term by placing trade on trader's behalf, trader waives relevant terms as condition precedent to obligation to pay.

3. Brokers 24(1)

Stockbroker's alleged violation of its own internal policies was no defense to trader's liability to stockbroker on options trading account; broker's policies did not rise to level of law or public policy.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, TUTTLE and RONEY*, Senior Circuit Judges.

RONEY, Senior Circuit Judge:

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Thomson McKinnon Securities, Inc., sued one of its former clients, Emory L. Clark, to recover payment of Clark's account, which resulted from losses in what has become known as "Black Monday," the stock market decline on October 19, 1987. The district court granted summary judgment to Thomson McKinnon on its breach of contract action, rejecting Clark's affirmative defenses. We affirm.

Thomson McKinnon is a stock brokerage firm based in New York City, with an office in Atlanta, Georgia. Clark is a lawyer in Atlanta with a general practice, emphasizing bankruptcy law. On June 6, 1986, Clark opened an account with Thomson McKinnon in order to trade on the exchange markets. In the customer account agreement executed by the parties, Clark agreed to pay any debts to Thomson McKinnon arising out of the account. Later, in October 1986 and September 1987, Clark signed agreements authorizing Thomson McKinnon to trade in option securities on his behalf. In the September 1987 agreement, Clark acknowledged that he was aware of the high risk involved in options trading and that such trading was "not unsuitable for [him] in light of [his] investment objectives, financial situation and needs, experience and knowledge." Clark represented that his financial condition met the requirements imposed by the rules of the exchange markets. In these agreements Clark promised to reimburse Thomson McKinnon for any liabilities the brokerage would incur with respect to Clark's margin calls or any requests for additional collateral on his market transac-

tions.

When a trader opens an account with a broker, the broker buys and sells options on securities on behalf of his client, the trader. The parties on the other end of these transactions look to the broker, not the trader, to satisfy obligations arising out of the transactions. The broker then credits or debits the trader's account, depending on whether there was a gain or loss in the transaction. The trader provides the broker with "margin," either money or securities, as security against potential losses. As a trader's account incurs greater losses, the broker may require its client to meet a "margin call," that is, to provide more collateral to the broker in order to keep the account active. The broker may also "close out" the trader's account to limit exposure to further losses. *See generally Prudential-Bache Securities, Inc., v. Stricklin*, 890 F.2d 704, 705-06 (4th Cir. 1989).

In 1987, Clark, through Thomson McKinnon, began to trade in short term options, primarily index options representing a group of securities. Clark was a speculator in the market. His general strategy was to deal short term only, to make quick profits if possible and to sell out quickly from losing positions. The broker assigned to Clark's account at Thomson McKinnon was Jerome C. Dodgen. Clark contacted Dodgen frequently to obtain his advice on market conditions, but Clark made all final decision on what positions he wished to take in his account. Clark was an experienced and sophisticated trader, having traded securities over a period of twenty years with several

brokers.

On Monday, October 19, 1987, the stock market experienced a massive 508 point decline. Clark lost between $7,000 and $8,000 on his account that day. Clark was in frequent contract with Dodgen throughout Monday, and knew that he had incurred substantial losses. On Tuesday morning, October 20, Clark called Dodgen and instructed him to enter into more transactions on Clark's behalf. Clark hoped to make back the losses he suffered the previous day. Clark told Dodgen that he was unable to pay the Monday losses immediately. Dodgen advised Clark not to enter into these new transactions because of the volatility of the markets, and Dodgen also stated that the brokerage may have established a policy against placing new orders. Dodgen nonetheless placed Clark's order. At the end of the day Clark's account had lost a great deal of money. When Clark informed Thomson McKinnon that he could not meet his margin call, Thomson McKinnon closed out the account, and sued Clark to recover over $130,000 unpaid on the account.

In its order granting summary judgment to Thomson McKinnon, the district court determined that Thomson McKinnon had established its claim for the principal and interest arising from Clark's breach of contract. Clark had initially counterclaimed asserting a breach of contract by Thomson McKinnon. He voluntarily withdrew the counterclaim. The district court ruled that Clark could not raise breach of contract as an affirmative defense to Thomson McKinnon's claims.

because he had previously agreed to dismiss his counterclaim with prejudice. The court, however, also rejected Clark's proffered affirmative defenses on the merits, holding that Clark's allegations that Thomson McKinnon breached certain exchange rules did not state an affirmative defense to his obligation to pay. The district court commented that Clark's allegation that Thomson McKinnon violated its own internal trading rules by placing Clark's order was unsupported by the record, since Thomson McKinnon instituted its policy against trading after Dodgen had already placed Clark's orders.

Thomson McKinnon concedes that the district court erred in holding that the dismissal of Clark's counterclaim barred his reliance on the affirmative defense of breach of contract. This error, however, does not require reversal of the summary judgment for Thomson McKinnon. The district court as an alternative holding, properly rejected the defense on its merits.

[1] Clark contends that Thomson McKinnon violated several rules of the Chicago Board of Opinions Exchange, the market in which the relevant transactions occurred. These rules require a broker to exercise due diligence in learning its client's financial condition and investment objectives, to maintain an amount of money in its client's margin account proportional to the account's level of trading, and to engage in just and equitable principles of trading. CBOE Rules 4.1, 9.7, 12. Clark alleges that Thomson McKinnon violated all these rules by

placing Clark's orders on October 20. A sophisticated and experienced trader, however, cannot defend against his broker's action for nonpayment on the ground that the broker violated exchange rules by over-extending credit to trader. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Brooks*, 548 F.2d 615 (5th Cir.) (per curiam), *cert. denied*, 434 U.S. 855, 98 S. CT. 173, 54 L.Ed.2d 126 (1977). *Accord Bache Halsey Stuart Shields, Inc. v. Erdos*, 35 Wash.App. 225, 667 P.2d 89 (1983); *Murlas Bros. Commodities, Inc. v. Bushman*, 91 Wis. 2d 126, 280 N.W.2d 769 (1979). *See also Thompson v. Smith Barney, Harris Upham & Co., Inc.*, 709 F.2d 1413, 1419 (11th Cir. 1983) (no private cause of action under federal securities laws for violation of exchange rules).

[2] The alleged defense is not strengthened by the fact that the exchange rules were incorporated into the agreements between Clark and Thomson McKinnon. When an experienced trader with knowledge of the circumstances related to his own financial condition and his position in the market expressly requests his broker to ignore a contractual term by placing a trade on his behalf, that trader clearly waives the relevant term as a condition precedent to his obligation to pay. See *Goldenberg v. Bache & Co.*, 270 F.2d 675, 681 (5th Cir. 1959); *Hecht v. Harris, Upham & Co.*, 283 F.Supp. 417, 428-31 (N.D. Cal. 1968), aff'd, 430 F.2d 1202, 1207-9 (9th Cir. 1970); *Blunt, Ellis & Loewi, Inc. v. Ingram*, 319 N.W. 2d 189 (Iowa 1982); 5 Williston on

Contracts § 689 (3d ed. 1961). *See also Ray E. Friedman & Co. v. Jenkins*, 738 F.2d 251, 254 (8th Cir. 1984) ("sophisticated, reckless trader" could not rely on technical breach of contract involving exchange rules to avoid payment of debit balance to broker) (citing *Brooks*, 548 F.2d at 616-17). The same equitable concerns supporting the result in *Brooks*, 548 F.2d at 615-16, apply in this situation.

[3] Clark argues that Thomson McKinnon violated its own internal policy by placing his orders on October 20. He asserts that although the district court concluded that Thomson McKinnon instituted its non-trading policy after Dodgen had placed Clark's orders, the case presented an issue of fact that could not be resolved at summary judgment. Even if Thomson McKinnon violated its own internal policies, however, Clark could not assert that fact as an affirmative defense to his liability to pay under the trading contract. A broker's internal policies do not rise to the level of law or public policy. Whether the firm's nontrading policy was in place when Dodgen placed Clark's order, or thereafter, is not a genuine issue of material fact that would preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986).

AFFIRMED.

Appendix B

UNITED STATES DISTRIC COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THOMSON MCKINNON SECURITIES,INC.	:	
VS.	:	CIVIL NO. 1:87-cv-2443-ODE
EMORY L. CLARK	:	

ORDER

This action in contract is before the court on Plaintiff Thomson McKinnon Securities, Inc's (Thomson McKinnon") Motion for Summary Judgment. Because the parties have stipulated to dismiss with prejudice Defendant Emory L. Clark's counterclaim against Thomson McKinnon and Jerome C. Dodgen, the court need not consider the portion of Plaintiff's motion concerning the counterclaim.

This case grows out of the stock market crash of October 19, 1987, popularly known as "Black Monday." Defendant Clark, an attorney, opened an account with brokerage firm Thomson McKinnon in the summer of 1986. In paragraph 3 of the Customer Account Agreement he signed to open his account, Mr. Clark agreed that:

> The undersigned [Mr. Clark] will at all times, without notice or demand from you [Thomson McKinnon], keep all accounts of the undersigned with you fully margined and/or collateralized in accordance withy our requirements, as such requirements may from time to time exist. The undersigned undertakes,

> at any time upon your demand to discharge obligations of the undersigned to you or, in the event of a closing of any account of the undersigned in whole or in part, to pay you the deficiency, if any and no oral agreement or instructions to the contrary shall be recognized or enforceable. The reasonable costs and expenses of collection of the debit balance and any unpaid deficiency in the accounts of the undersigned with you, including, but not limited to attorneys' fees, incurred and payable or paid by you shall be payable to you by the undersigned.[1]

Mr. Clark also entered two letter agreements entitled "Supplemental Information and Agreement for Option Trading" on October 30, 1986 and September 17, 1987.[2] The agreements are almost identical. In both Mr. Clark lists his annual income at "100,000+", his net liquid assets at $25,000 and his net worth at $500,000. The only major difference in the agreements is that in the latter, Mr. Clark indicated his intent to enter high risk investments.

In paragraph 10 of both letter agreements Mr. Clark agreed that:

> We are aware of the high degree of risk involved in options transactions and have given your firm, in strict confidence, information to demonstrate that this account and the trading anticipated in connec-

---

[1] Although the document from the summer of 1986 is undated, Mr. Clark later signed an identical copy of the Customer Account Agreement on January 25, 1987.

[2] Both letter agreements inlcude a paragraph 6 that is very similar to paragraph 3 in the Customer Accoung Agreement and allows Thomas McKinnon to "Take any and all steps necessary to protect your said firm in connection with any such part or call transactions..."

> tion therewith is not unsuitable for us in light of our investment objectives, financial situation and needs, experience and knowledge. We agree to advise your firm of any changes in our investment objectives, financial situation or other circumstances that may be deemed to materially affect the suitability of executing options transactions for our account.

Further Mr. Clark has admitted in deposition that he was aware of the high risk involved in option trading. (Clark Dep., p. 34). He also acknowledged that he had been trading on the stock market for twenty years. (Clark Dep., p. 23).

On October 19, 1987, one month after signing the second letter agreement, the stock market dropped 508 points. Mr. Clark lost thousands of dollars in the market. That same day, in a transaction in the options market with Thomas McKinnon, Mr. Clark lost $7,000.

Despite these losses, Mr. Clark decided to make one last gamble and then get out of the market. The morning after the drop, on October 20, 1987, Mr. Clark authorized his personal broker at Thomas McKinnon, Jerome Dodgen, to buy for his account "20 OEX November 255 put options." A "put" is a security representing the right to sell a certain number of shares of stock at a stated price up to a certain date. In this transaction, one "20 OEX November 255 put" represented the right to sell 100 shares of OEX stock at $255 up to a certain date in November, 1987. Since the value of a put increases as the price of the underlying stock decreases, Mr. Clark was betting that

the underlying security would decline in value. Because changes in the value of the underlying security have a dramatic impact on the price of a put, this was a high risk investment.

Mr. Clark admitted in deposition he understood that he could make a hundred percent return or more, or could lose everything in one day in the options market. (Clark Dep. p. 26). Indeed, he had lost seven thousand dollars the previous day in a put transaction that only lasted five minutes. Nevertheless, he though because the market was "going to go down" he would buy puts to make a quick profit. (Id.) He made this decision against the advice of Mr.Dodgen, who informed him both on October 19th and the morning of October 20th that it was too risky to make another investment. (Clark Dep., p. 86). Mr. Clark told Mr. Dodgen that although he could not afford to pay the $7,000 he had lost the day before, he wanted to make another order.[a]

Unfortunately, the market was volatile on October 20, 1987. Because of the high volume of trading, Mr. Clark was uncertain how many puts he controlled after his order and decided to cancel his put order. However, as a result of the heavy volume of options trading he could not obtain a report confirming that his earlier purchase had been canceled. (Clark Dep. p.p. 87-88).

---

[a]Mr. Clark stated in his deposition, p. 78, "If I can't pay seven thousand what's the difference between losing seven thousand and fifty thousand. It was not a well thought out state of mind."

Mr. Clark and Mr. Dodgen talked several times on October 20th. Neither man could discover much information about the market in its chaotic state. In the afternoon, believing that his earlier cancellation order had been executed and that he was ten to twenty puts short of closing out his account, Mr. Clark entered a second order for 20 OEX November 255 put options. He was aware at the time that if his cancellation order had not been executed, he would have a total of 40 OEX put options in the market and be at great risk. (Clark Dep., p. 92). Despite the advice of Mr. Dodgen and the information blackout, Mr. Clark decided to try and cut his losses by making the additional purchase. (Clark Dep., p. 93).

As it turns out, both Mr. Clark's morning and afternoon purchases had been executed, despite the cancellation order. In the aftermath of Black Monday, Mr. Clark's gamble "went bust" and he incurred large additional losses. On October 22nd Mr. Clark met with Thomson McKinnon's Atlanta branch manager James F. Mathes. Mr. Mathes told Mr. Clark that he would have to pay a federal margin[4] call on his accounts of $250,000. (Clark Dep., p. 97). After Mr. Clark told him that he could not make the margin call, Mr. Mathes sold Mr. Clark's options in the market

[4] In the options market, margin is a sum of money, or its equivalent, placed in the hands of a broker by the principal or person on whose account a purchase or sale is to be made, as a seucrity to the former against losses to which he may be exposed by subsequent fluctuations in the market value. See Black's Law Dictionary (5th ed. 1979).

and closed his account as allowed in paragraph 3 of the Customer Account Agreement (Clark Dep., pp. 95, 97). Thomas McKinnon claims Mr. Clark still owes Thomas McKinnon $130,219.79 under the Customer Account Agreement which he was refused to pay.

Thomas McKinnon brings suit on the series of agreements it entered with Mr. Clark for $130,219.79 principal, as well as interest and attorneys' fees. Although Mr. Clark included with his answer a counterclaim against Thomas McKinnon and his broker, Mr. Dodgen, asserting securities law violations, he later entered a stipulation dismissing this counterclaim with prejudice.

Mr. Clark's counterclaim alleged the same defenses he now asks the court to consider in his brief in opposition to summary judgment. However, because he signed a stipulation agreeing to dismiss his counterclaim with prejudice, Mr. Clark cannot defend this suit on any of the issues raised in the counterclaim, namely violation of securities laws or breach of contract based on Thomas McKinnon alleged failure to follow Chicago Board of Options Exchange ("CBOE") rules. See Hart v. Yamaha-Parts Distributors, 787 F.2d 1468, 1470 (11th Cir. 1987); 9 Wright and Miller, Federal Practice and Procedure, section 2373 at p. 230 ("A dismissal with prejudice will bar a

subsequent action between the same parties").[5]

Further, Mr. Clark offers no evidence to support his defense that Thomas McKinnon and Mr. Dodgen violated CBOE rules by allowing him to trade, despite his inability to pay. Although Mr. Clark told Mr. Dodgen on October 19th he could not immediately pay his seven thousand loss on puts that day, his agreement with Thomas McKinnon indicated otherwise. He had an annual income of more than $100,000, liquid assets of $25,000 and a net worth of $500,000. Mr. Dodgen stated in deposition that Mr. Clark met the CBOE's prerequisite for trading in the puts market because he had over $100,000 in income and liquid assets. (Dodgen Dep., p. 13). In addition, Mr. Clark admitted in deposition that although he could not immediately pay his debts if the market went against him, he would eventually be able to pay.[6]

Even if Mr. Clark was not barred from defending on the substance of his counterclaim, Thomas McKinnon would still be

---

[5] Even though it is exercising diversity jurisdiction, the court must apply federal law when determining the preclusive effect of a federal judgment. Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1503 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985).

[6] Mr. Clark stated in deposition that:

> I felt that I could eventually pay for it. I had that office building. But as far as being able to send a check within a few days, no, I couldn't do that. (Clark Dep., p. 690).

entitled to summary judgment. This court has previously held that violations of a local exchange's "know your customer" and "suitability" rules do not give rise to a private cause of action. Thomson v. Smith Barney, Harris Upham & Co., 539 F.Supp. 859, 865 (N.D. Ga. 1982), aff'd, 709 F.2d 1413 (11th Cir. 1983).[7]

Mr. Clark's allegation that Thomas McKinnon kept too little margin in his account in violation of CBOE rules does not preclude the brokerage firm from collection on the contract. In the factually similar case of Merrill Lynch, Pierce, Fenner & Smith v. Brooks, 548 F.2d 615 (5th Cir.), cert. denied, 434 U. S. 855 (1977) the Fifth Circuit held that even though a brokerage firm may have overextended credit to their customer, the latter would still be required to pay his contractual obligation. Id. at 616-17. Like Mr. Clark, the customer in Brooks was sophisticated and knew as well as his broker the risks involved in trading. Consequently, Mr. Clark cannot defend this lawsuit on alleged violations of CBOE rules.

Nor has Mr. Clark shown that Thomson McKinnon or Mr. Dodgen in any way breached their contract with him. As broker to Mr. Clark, Mr. Dodgen repeatedly advised him not to make either of the two put transaction on October 20th. Mr. McKinnon

---

[7]Mr. Clark cites several C.B.O.E. Rules that state a options broker must: 1) with "due diligence" learn the customers investment objective and financialassets (C.B.O.E. Rule 9.7); 2) insure that the customer has proper and adequate margin (C.B.O.E. Rule 12.1); and 3) make a daily record of when margin must be obtained (C.B.O.E. Rule 12.12).

cannot claim Thomson McKinnon failed to exercise "due diligence" by allowing him to trade, when he himself failed to exercise reasonable diligence. See Thompson, 709 F.2d at 1418 (no federal securities claim when client fails to exercise reasonable diligence). Consequently, Mr. Clark's argument that Thomson McKinnon is estopped by its own breach from enforcing the contract is without merit.

As a last defense, Mr. Clark maintains that Thomson McKinnon broke its own policy made in the wake of Black Monday not to trade for its customers except to close out accounts. This defense as well must fail because Thomson McKinnon did not initiate its policy until late in the week, after Mr. Clark sustained his losses.[8] (Dodgen Dep., p. 19).

To prevail under Fed.R.Civ.P. 56(c) the party moving for summary judgment must demonstrate "there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Thomas McKinnon has met this burden. Further, because Mr. Clark is precluded from defending on the substance of his counterclaim and has failed to establish the essential elements of any affirmative defense, Thomas McKinnon is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 323 (1986).

[8] Because Mr. Clark's eventual goal was to close out his account, Mr. Dodgen;s acttions arguably would not have been contrary to company policy.

Accordingly, Plaintiff's Motion for Summary Judgment is GRANTED. Plaintiff is DIRECTED to submit an affidavit of indebtness indicating the total amount in principal, interest and attorney's fees due within twenty (20) days of the entry date of this order.

SO ORDERED, this 4 day of January, 1989.

s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

Appendix C

United States Court of Appeals

For The Eleventh Circuit

No. 89.8538

D.C. Docket No, 1:87-cv-2443-ODE

THOMPSON MCKINNON SECURITIES, INC.,

Plaintiff-Appellant.

versus

EMORY L. CLARK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern Distric of Georgia

Before TJOFLAT, Chief Judge, TUTTLE AND RONEY*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is herby AFFIRMED;

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the clerk of this court.

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Entered: May 23, 1990
For the court: Miguel J. Cortez, Clerk
By: s/Karen McNable
Deputy Clerk

Appendix D

United States Court of Appeals
For The Eleventh Circuit

No. 89.8538

THOMPSON MCKINNON SECURITIES, INC.,

Plaintiff-Appellant.

versus

EMORY L. CLARK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern Distric of Georgia

ON PETITION(S) FOR REHEARING
(July 27, 1990)

BEFORE: TJOFLAT, Chief Judge, TUTTLE and RONEY, Senior Circuit Judges.
PER CURIAM:

The petition(s) for reharing filed by appellant,

Emory L. Clark, is denied.

ENTERED FOR THE COURT:

s/Gerald Tjoflat
United States Circuit Judges

Appendix E

Rule 56. Summary Judgment

(c) Motion and Proceeding Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in eivdence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverese party's pleading, but the adverse party's response , by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Appendix F

15 U.S.C.
§78g. Margin requirements

(a) Rules and regulations for extension of credit; standard for initial extension; undermargined accounts. For the purpose of preventing the excessive use of credit for the purchase of carrying of securities, the Federal Reserve Board [Board of Governors of the Federal Reserve System] shall, prior to the effective date of this section and from time to time thereafter, prescribe rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained on any security (other than an exempted security). For the initial extension of credit, such rules and regulations shall be based upon the following standard: An amount not greater than whichever is the higher of-

(1) 55 per centum of the current market price of the security, or

(2) 100 per centum of the lowest market price of the security during the preceding thirty-six calendar months, but not more than 75 per centum of the current market price.

Such rules and regulations may make appropriate provision with respect to the carrying of undermargined accounts for limited periods and under specified conditions; the withdrawal of funds or securities; the substitution or additional purchases of securities; the transfer of accounts from one lender to another; special or different margin requirements for delayed deliveries, short sales, arbitrage transactions, and securities to which paragraph (2) of this subsection does not apply; the bases and the methods to be used in calculating loans, and margins and market prices; and similar administrative adjustments and details. For the purposes of paragraph (2) of this subsection, until July 1, 1936, the lowest price at which a security has sold on or after July 1, 1933, shall be considered as the lowest price at which such security has sold during the preceding thirty-six calendar months.

(b) Lower and higher margin requirements. Notwithstanding the provisions of subsection (a) of this section, the Federal Reserve Board [Board of Governors of the Federal Reserve System], may, from time to time, with respect to all or specified securities or transactions, or classes of securities, or classes of transactions, by such rules and regulations (1) prescribe such lower margin requirements for the initial extension or maintenance of credit as it deems necessary or appropriate for the accommodation of commerce and industry, having due regard to the general credit situation of the country, and (2) prescribe such higher margin requirements for the initial extension or maintenance of credit as it may deem necessary or appropriate to prevent the excessive use of credit to finance transactions in securities.

(c) **Unlawful credit extension to customers.** It shall beunlawful for any member of a national securities exchange or any broker or any dealer, directly or indirectly, to extend or maintain credit or arrange for the extension or maintenance of credit to or for any customer-

(1) on any security (other than an exempted security), in contravention of the rules and regulations which the Board of Governors of the Federal Reserve System shall prescribe under subsections (a) and (b) of this section;

(2) without collateral or on any collateral other than securities, except in accordance with such rules and regulations as the Board of Governors of the Federal Reserve System may prescribe (A) to permit under specified conditions and for a limited period any such member, broker, or dealer to maintain a credit initially conformity with the rules and regulations the Board of Governors of the Federal Reserve System, and (B) to permit the extension or maintenance of credit is not for the purpose of purchasing or carrying securities or of evading or circumventing the provisions of extended in of paragraph (1) of this subsection.